88-1116

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ALTON & SOUTHERN LODGE NO. 306,
BROTHERHOOD OF RAILWAY CARMEN OF THE
UNITED STATES AND CANADA
Petitioner,

vs.

THE ALTON & SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL C. HETTERMAN*
M. JANE MATOESIAN
1015 Locust Street, Suite 900
St. Louis, Missouri 63101
(314) 241-5620
Attorney for Petitioner

*Counsel of Record

18 pp

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QUESTION PRESENTED

WHETHER THE OPINION OF THE EIGHTH CIRCUIT COURT OF APPEALS THAT THE PAST PRACTICE RULE IS APPLICABLE ONLY WHERE THE PRACTICE OF THE PARTIES FILLS IN FOR CIRCUMSTANCES NOT COVERED BY THE COLLECTIVE BARGAINING AGREEMENT IS CONTRARY TO THIS COURT'S RULING IN DETROIT & TOLEDO SHORE LINE RAILROAD v. UNITED TRANSPORTATION UNION.

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THE ALTON & SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari
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For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered on June 21, 1988. Petitioner's Petition for Rehearing

or Rehearing en banc was denied on September 14, 1988.

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix A) is reported at 859 F.2d 1111. The Opinion of the United States District Court for the Eastern District of Missouri, Eastern Division, appears in Appendix D, attached hereto.

JURISDICTION

The Judgment of the Court of Appeals (Appendix A) was entered on June 21, 1988. Petitioner's Petition for Rehearing was denied on September 14, 1988 (Appendix E). The jurisdiction of this Court is evoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant portions of the Railway Labor Act (hereinafter referred to as RLA), 45

U.S.C Sec. 153 et seq., are set forth in Appendix G.

STATEMENT OF THE CASE

The relevant facts were stipulated to by the parties before the United States District Court of the Eastern District of Missouri, Eastern Division. Petitioner is a labor organization, the members of which are employed by Respondent. In particular, fourteen members of Petitioner are employed at Respondent's repair track in E. St. Louis, Illinois. The working arrangement between the carmen employees of Petitioner and Respondent is governed by a general collective bargaining agreement entitled "Agreement Between Alton & Southern Railroad System Federation No. 154, Railway Employees Department, AFL-CIO." (Appendix F) This

Agreement covers rates of pay, rules and working conditions for those carmen employees working at Respondent's E. St. Louis repair track.

For approximately thirty years, from 1953 until 1983, the carmen assigned to the repair track worked eight hours per day, from 7:00 a.m. to 3:30 p.m. with the exception of one carmen-painter, who worked an 8:00 a.m. to 4:00 p.m. shift. All employees received a twenty minute paid lunch period. On November 22, 1983, Respondent unilaterally changed the work schedule of the carmen repair track employees to 8:00 a.m. to 4:30 p.m. with a thirty minute unpaid lunch period.

Petitioner filed this action on April 5, 1984 in the Circuit Court of the City of St. Louis, State of Missouri, Twenty-

Second Judicial Circuit, pursuant to the Railway Labor Act (hereinafter RLA), 45 U.S.C. Secs. 153-188, seeking to enjoin Respondent from instituting its proposed work schedule. Petitioner contended that the effected changes constituted "major" changes under the RLA, and, as such, injunctive relief was necessary to preserve the status quo. Respondent removed the cause of action to the United States District Court for the Eastern District of Missouri, Eastern Division. Following a bench trial, the District Court entered an order on January 14, 1987, in favor of Respondent, and found that the collective bargaining agreement "arguably justified" Respondent's unilateral action, thus bringing the matter within the definition of a "minor" dispute

within the exclusive jurisdiction of the National Railroad Adjustment Board (hereinafter NRAB), Sec. 153(i) of the RLA. As such, injunctive relief was denied. An appeal from this Order was taken by Petitioner to the United States Court of Appeals for the Eighth Circuit, and Respondent cross-appealed the District Court's order denying as moot its request to reopen the record and admit an NRAB award into evidence.

Judgment was entered by the United States Court of Appeals for the Eighth Circuit on June 21, 1988 (Appendix B), in a split decision affirming the Order of the United States District Court for the Eastern District of Missouri, Eastern Division. The Court of Appeals found that the parties' thirty year work practices could not be considered to be

implied terms in the collective bargaining agreement since the agreement itself could arguably be read to contain provisions governing the employees' working conditions which were in accordance with those proposed by Respondent. According to the majority, the parties' past practices could be considered only where the agreement is silent as to those issues in dispute. Petitioner filed a Petition for Rehearing or Rehearing en banc on July 5, 1988, which was denied by the United States Court of Appeals for the Eighth Circuit on September 14, 1988 (Appendix E), with three judges dissenting.

REASONS FOR GRANTING THE WRIT

I. The "past practice rule" should apply irrespective of whether the labor agreement is silent as to the issues in dispute.

The Railway Labor Act, 45 U.S.C. Sec. 153 et seq., was passed with the intent to promote the efficient resolution of disputes between railroads and their union employees. Detroit & Toledo Shore Line Railroad Company v. United Transportation Union, 396 U.S. 142, 90 S.Ct. 294 (1969). Under the RLA, carrier-employee disputes may be resolved in two different ways, depending on whether the dispute may be classified as "minor" or "major". Minor disputes are those "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions" and tend to involve controversies over the meaning of an existing collective bargaining agreement in a particular fact situation and typically involve only one employee.

They are resolved by mandatory arbitration procedures conducted by the NRAB, as dictated by the Sec. 3 of the RLA. 45 U.S.C. Sec. 153 First (i); Landfried v. Terminal Railroad Association of St. Louis, 554 F.Supp. 720 (E.D.Mo. 1982), affirmed 721 F.2d 254 (8th Cir. 1983), cert. denied 104 S.Ct. 712.

By contrast, major disputes arise out of the formation or change of the collective bargaining agreement covering rates of pay, rules or working conditions. Detroit, 396 U.S. 142, 90 S.Ct. 294, 299. The procedures for resolving major disputes involve negotiations and mediation by the National Mediation Board. During the mediation period, the parties to the dispute are required to preserve the status quo.

The question of whether the dispute between the Petitioner and Respondent was to be characterized as major or minor was addressed by both the District Court and the Court of Appeals. The majority of the Court of Appeals held that the dispute was minor because the collective bargaining agreement was "reasonably susceptible" to the interpretations sought by both Petitioner and Respondent. Alton & Southern Lodge No. 306 Brotherhood Railway Carmen of the United States and Canada v. The Alton & Southern Railway Company, 849 F.2d 1111 1114 (8th Cir. 1988). However, a closer examination of the relevant facts and applicable law reveals that the reasoning of the Court of Appeals is flawed.

In order to determine whether a dispute is major or minor, the contents of

the collective bargaining agreement must first be ascertained. Second, the long-standing, established working relationships, customs and practices of the parties must be recognized. Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad Company, (8th Cir. 1986), 802 F.2d 1016, 1022. These long-standing relationships, customs and practices have been described by this Court as "actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose." Detroit, 396 U.S. 142, 90 S.Ct. 294, 301. Furthermore, when those practices achieve the status of an established working relationship between the parties, the Courts have held that such

custom should be considered to be part of the collective bargaining agreement itself and therefore afforded protection from sudden, unilateral change by either of the parties. In essence, the parties' conduct is elevated to an implied contractual status. Detroit, 396 U.S. 142, 90 S.Ct. 294, 296, Burlington Northern, 802 F.2d 1016, 1022, Independent Federation of Flight Attendants v. Trans World Airlines, 655 F.2d 155, 157 (8th Cir. 1981).

In the present case, the parties stipulated that, for approximately thirty years, the carmen worked from 7:00 a.m. to 3:00 p.m. with a twenty minute paid lunch break. It cannot be disputed that this practice was continuous and accepted by both parties. Therefore, applying the analysis of the

Detroit, Burlington Northern and Trans World cases, the past practice demonstrated here must be viewed as an implied term of the collective bargaining agreement, a de facto condition of employment. The collective bargaining agreement had remained essentially the same since 1947, and, although there had been renegotiations and amendments since then, the work schedule and paid lunch period for these employees has been the same for at least thirty years. Had the majority properly read this implied contract term into the collective bargaining agreement in order to ascertain the terms of that agreement, then it would have logically been compelled to find the dispute was major and an injunction should be issued to restrain Respondent's actions.

The provision of the collective bargaining agreement discussing working hours and length of the lunch period is itself vague and ambiguous and does not, in and of itself, definitively establish the employees' working hours and lunch period. That provision provides as follows:

> "When one shift is employed, the starting time shall not be earlier than 7:00 a.m., nor later than 8:00 a.m. The time and length of the lunch period shall be subject to mutual agreement with the committee." Rule 2, Agreement Between Alton & Southern Railroad and System Federation No. 154, Railway Employees Department, AFL-CIO."

This provision fails to state whether single shift employees might get paid for lunch. It is not unusual for labor contracts to have vague and ambiguous terms because such contracts are often negotiated and drafted in part without

assistance of counsel. Similarly, provisions are frequently drafted somewhat vaguely to permit flexibility between the parties. For this reason the Court recognized the importance of considering past practices in Detroit. In that case, this Court recognized that it would be "virtually impossible" to include all working conditions in a collective bargaining agreement, and, where such established practices are "satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been more frequent in the railroad industry than in most others." Detroit, 396 U.S. 154, 90 S.Ct. 294, 302. It is thus imperative to consider the established custom and practice of the parties when construing their labor agreement.

The majority's refusal to consider the established custom and practice of the parties constitutes a great departure from the approach taken by this Court and by the Eighth Circuit Court of Appeals. Although the majority recognized the relevance of past practices to the determination of the contents of the labor agreement, it nevertheless concluded that the express terms of the agreement control the dispute, and, therefore, past practices are not to be utilized to "fill in" the terms of the agreement. Alton & Southern, 859 F.2d 1111, 1114. This decision was in error.

This error lies in the fact that the majority has now restricted the past practice rule to only those circumstances not covered by the collective bargaining agreement.[1] It has mistakenly treated

the District Court's "determination of the terms of the agreement" as a question of fact. Alton & Southern, 859 F.2d 1111, 1114. It must be noted that the parties stipulated to the terms of the written contract and the established past practices. There was, therefore, no factual determination to be made. The only issue was to determine the significance of the established past practices. This is a question of law, not of fact. Moreover, as stated in the dissenting opinion, the majority has now overruled the decision of this Court:

> "[T]he argument relied upon by the majority, rather, is that if the collective bargaining agreement can arguably be interpreted to permit the railroad to do what it wants to do, the established past practice rule of the Supreme Court in Detroit & Toledo Shore Line R.R. is not applicable. The majority's erroneous interpretation thus effectively overrules Detroit & Toledo Shore Line R.R." Alton & Southern, 859

F.2d 1111, 1116.

On its face, the majority's opinion would now seem to permit the parties to unilaterally change long standing working conditions so long as they can demonstrate that there is a provision in the collective bargaining agreement that can arguably be subject to such an interpretation. Thus, the parties can now avoid the status quo provision of the RLA, which is a novel and clear departure from the rule laid down by this Court in Detroit when it discussed the railroad's attempt to unilaterally change the workers' assignments:

> "It is quite apparent that under interpretation of the status quo requirement, the argument advanced by the [railroad] has little merit. The railroad contends that a party is bound to preserve the status quo in only those working conditions covered in the parties' existing collective agreement, but nothing in the status quo provisions of Secs. 5, 6, or 10

> [of the RLA] suggests this restriction. We have stressed that the status quo extends to those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement. Thus, the mere fact that the collective agreement before us does not expressly prohibit outlying assignments would not have barred the railroad from ordering the assignments that gave rise to the present dispute if, apart from the agreement, such assignments had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions. Here, however, the dispute over the railroad's establishment of the Trenton assignments arose at a time when actual working conditions did not include such assignments. It was therefore incumbent upon the railroad by virtue of Sec. 6 [of the RLA] to refrain from making outlying assignments at Trenton or any other place in which there had previously been none, regardless of the fact that the railroad was not precluded from making these assignments under the existing agreement." Detroit, 396 U.S. 142, 90 S.Ct. 294, 301 (footnote omitted).

As further noted in the dissent, the

Eighth Circuit Court of Appeals has held

that the term "working conditions" is to be broadly interpreted, and "includes those actual, objective working conditions out of which the dispute arose and which may not necessarily be covered in an existing collective bargaining agreement." Trans World, 655 F.2d 155, 157.

The majority has ignored the clear meaning of this standard and has interpreted it to mean that if there is a contractual provision that can be identified as arguably relevant to the issues in dispute, then a long standing practice may not be considered. Clearly, the majority has misread the applicable law.

If the logic of the majority were accepted, then a party need only to conjure an "arguable interpretation" of the

agreement to support its change in the status quo. Here, the carmen had a thirty year history of working a 7:00 a.m. to 3:00 p.m. shift with a twenty minute paid lunch period, but because Respondent has propounded a "reasonably susceptible" interpretation of the 1947 agreement to permit a change, the carmen have, since 1983, been dispossessed of their regular work schedule and suffered a reduction in their rate of pay. There was no negotiation or mediation in exchange for such changes; there is simply Respondent's unilateral action. Should this decision be allowed to stand, the only time a major dispute could arise would be if the railroad took some type of unilateral action clearly prohibited by the terms of the written agreement. The impact of such a

ruling cannot be underestimated to all railroad workers in the U.S. operating under a collective bargaining agreement. First of all, those persons governed by the RLA will no longer be concerned with "past practices" or the "status quo"; rather than attempting to negotiate proposed changes in good faith and follow the mediation mandated in the RLA, the parties will simply make the changes and expend their resources on "crafty interpretations" of the written agreement. Given that most collective bargaining agreements were written many years ago with the intent of creating a document to encourage collective bargaining and to prevent interruptions of interstate commerce, the agreements will be subject to alterations which are, by some strange leap of legal logic, contained

within the terms of the agreement. The result will only be more unilateral changes on the part of the railroads and strikes on the part of the unions and will frustrate the purpose of the RLA. As was stated by this Court in Brotherhood of Railroad Trainmen v. Jacksonville Terminal Company:

> "The heart of the Railway Labor Act is the duty, imposed ... upon management and labor, 'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, working conditions, and to settle all disputes ... in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 394 U.S. 369, 89 S.Ct. 1109, 1114-1115 (1968); in accord, Chicago & Northwestern Railway Company v. United Transportation Union, 402 U.S. 570, 91 S.Ct. 1731, 1734 (1970).

Should the opinion of the Eighth Circuit Court of Appeals be allowed to stand, any attempt to preserve this

vital source of interstate commerce and harmonious management-labor relations in general, will be crippled. To allow the railroad to "circumvent the federal system of railroad bargaining, or any of the other elements of federal regulation of railroads, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system." United Transportation Union v. Long Island Railroad Company, 455 U.S. 678, 102 S.Ct. 1349, 1356 (1982).

CONCLUSION

Because the decisions announced below are in conflict with the decisions and principles announced by this Court and are in conflict with the decisions of other Circuits of United States Courts of Appeals, and because valuable interests are at issue, this Court should grant a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

PAUL C. HETTERMAN*
M. JANE MATOESIAN
1015 Locust Street, Suite 900
St. Louis, Missouri 63101
(314) 241-5620

*Counsel of Record

APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 87-1151

Alton & Southern Lodge No. 306
Brotherhood Railrway Carmen of the
United States and Canada,
Appellee,
v.
The Alton & Southern Railway Co.,
Appellant.

No. 87-1139

Alton & Southern Lodge No. 306
Brotherhood Railway Carmen
of the United States and Canada,
Appellant,
v.
The Alton & Southern Railway Co.,
Appellee.

Appeals form the United States District
Court for the Eastern District of
Missouri

Submitted: October 13, 1987
Filed: June 21, 1988

Before HEANEY, Circuit Judge, FLOYD R.
GIBSON, Senior Circuit Judge, and
WOLLMAN, Circuit Judge.

Wollman, Circuit Judge. Alton &

Southern Lodge No. 306 (Lodge 306)

appeals from the order of the district

court[1] denying its request for injunctive relief. Alton & Southern Railway Company (Alton & Souhtern) cross-appeals from the district court's denial as moot Alton & Southern's motion to reopen the record to admit a National Railroad Adjustment Board (NRAB) award into evidence. We affirm as to both appeals.

Lodge 306 is a labor organization composed of carmen employed by Alton & Southern. From approximately 1947 to 1983, the carmen of Lodge 306 who were assigned to the repair track worked from 7:00 a.m. to 3:00 p.m., including a twenty-minute paid lunch period. On November 22, 1983, after two unsuccess-

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[1] The Honorable Edward L. Fillipine, United States District Judge for the Eastern District of Missouri.

ful attempts to negotiate a new work schedule, Alton & Southern unilaterally changed the fourteen carmen's hours to 8:00 a.m. to 4:30 p.m., with a 30 minute unpaid lunch period. On April 5, 1984, Lodge 306 brought a suit in Missouri state court, alleging violation of the collective bargaining agreement. Alton & Southern removed the suit to federal district cout. At approximately this same time, Lodge 306 also filed similar claims with the NRAB.

The general collective bargaining agreement governing rates of pay, rules, and working conditions provides, in relevant part, as follows:

> Rule 1: Eight (8) hours shall constitute a day's work, and five (5) days a week for the regular forces.
>
> NOTE: The expression [] *** "work" used in this Rule refer[s] to service,

duties or operations necessary to be performed ***.

Rule 2: When one shift is employed, the starting time shall not be earlier than 7:00 a.m., nor later than 8:00 a.m. The time and length of the lunch period shall be subject to mutual agreement with the Committee.

Rule 3: When more than one shift is employed, the starting time of the first shift shall be govered by Rule 2. The starting time of the second, or the second and third shifts shall be arranged for the best interest of the work to be performed, but in no case inconsistent with the employee's welfare. Each shift shall consist of eight (8) consecutive hours, including an allowance of twenty (20) minutes for lunch within the limites of the fourth and fifth hours. When service requirements will not permit the taking of the lunch period within the fourth and fifth hours as per this rule, a penalty time of twenty (20) minutes at pro rata rate will be allowed and the employee will allowed to procure lunch without loss of time as soon thereafter as possible.

* * * *

Rule 7: Employees assigned under the provisions of rule 2 required to work during the lunch period will be paid for one-half hour at straight

> time and be allowed the necessary time to procure lunch without loss of time.

Under the Railway Act, 45 U.S.C. §§ 151 et seq. (1986), labor disputes are characterized either as major or minor. In essence, a major dispute involves the formation or alteration of a collective bargaining agreement covering pay, rules, or working conditions, while a minor dispute merely involves differing interpretations of such an agreement. See Missouri Pacific Joint Protective Bd., Bhd. Ry. Carmen of the United States and Canada, AFL-CIO v. Missouri Pacific R.R. Co., 730 F.2d 533, 536 (8th Cir. 1984) (Missouri Pacific); Independent Fed'n of Flight Attendants v. Trans World Airlines, Inc., 655 F.2d 155, 158 (8th Cir. 1981) (Flight Attendants). In other words, a major

dispute concerns one party's attempt to "acquir[e]" new "rights for the future," rather than asserting rights that arguably exist under the current agreement, as in a minor dispute. Elgin, Joliet, and Eastern Ry. v. Burley, 325 U.S. 711, 723-24 (1945), aff'd on rehearing, 327 U.S. 661 (1946). When the surrounding circumstances are ambiguous, the courts favor construing diputes as minor. See Brotherhood of Locomotives Eng'nrs v. Atchison, Topeka and Santa Fe Ry. Co., 768 F.2d 914, 920 (7th Cir. 1985) (citations omitted).

If a dispute is major, the federal courts may readily issue an injunction to preserve the status quo during an ongoing labor board mediation. If the dispute is minor, however, the federal courts will only rarely issue an

injuction, utilizing traditional equitable principles. Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R. Co., 802 F.2d 1016, 1021-22 (8th Cir. 1986) (Arnold, J., for a unanimous court) (Burlington Northern). In addition, when the dispute is minor, one party may make small alterations in the working conditions unilaterally pending the NRAB's resolution. Id. at 1021.

The first step in determining whether a dispute is major or minor is to ascertain the content of the collective bargaining agreement. Burlington Northern, 802 F.2d at 1022. Long-standing working relationships, customs, and practices, although not reduced to writing, are to be considered as implied terms in the agreement when they have

ripened into an established and recognized custom between the parties. Id. The district court found that the parties' established past practices were "clearly relevant" in determining the terms of the agreement between them, but also found that the past practices did not supply a term or conditon of the working relationship between the parties that was not included within the written agreement. Alton & Southern Lodge No. 306, Bhd, Ry, Carmen of the United States and Canada v. Alton & Southern Ry. Co., 651 F. Supp. 1190, 1192-93 (E.D. mo. 1987) (Alton & Southern). The determination of the terms of an agreement is a question of fact that may be reversed only if clearly erroneous, Brotherhood of Maintenance of Way Employees v. Chicago and Northwestern

Transp. Co., 827 F.2d 330, 334 (8th Cir. 1987) (Chicago and Northwestern), and we hold that the district court's determination in this regard was not clearly erroneous.

The next question is whether the agreement is "'unreasonably susceptible'" to the interpretations sought by both parties. Flight Attendants, 655 F.2d at 158-59 (quoting United Transp. Union v. Burlington Northern, Inc., 458 F.2d 354, 357 (8th Cir. 1972). If it is, the dispute is minor. Id. Although this is a legal question that we may review de novo, Chicago and Northwestern, 827 F.2d at 334, we agree with the district court's decision on this issue and adopt its reasoning. After acknowledging the relevance of past practices to the determi-

nation of the contents of the agreement, the district court nevertheless found that the express terms of the agreement controlled the dispute. Alton & Southern, 651 F. Supp. at 1192-93 ("[t]his case * * * does not present a situation where the practice of the parties fills in for circumstances not covered by the agreement").

We agree. In the process of determining whether an agreement is reasonably susceptible to a party's proposed interpretation, or whether that interpretation is "arguably comprehended" within the agreement, see Burlington Northern, 802 F.2d at 1022, "evidence of past practice is not dispositive in the face of contrary indications from the agreements' language." Brotherhood of Ry. Carmen of the United States and

Canada, AFL-CIO-CLC v. Norfolk and Western Ry. Co., 745 F.2d 370, 377 (6th Cir. 1984); see Railway Labor Executives Ass'n v. Norfolk and Western Ry. Co., 833 F.2d 700, 705 n.4 (7th Cir. 1987) ("parties cannot use evidence of past practices to contradict the explicit language of their written agreement in an effort to change the characterization of a dispute as either major or minor"); Air Line Pilots' Ass'n v. Trans World Airlines, 713 F.2d 940 948 (2d Cir. 1983) ("when there is a 'clearly governing provision in the present agreements,' [the court] need not range beyond the interpretation of the language of the agreement") (citation omitted), aff'd in part rev'd in part

sub nom. Trans World Airlines, Inc. v. Thurston, 469 U.S.111 (1985).[2]

The terms of the agreement for a single shift cover starting time, see Rule 2 ("starting time shall not be earlier than 7:00 a.m., nor later than 8:00 a.m."), the time and duration of lunch, see id. ("[t]he time and length of the lunch period shall be subject to mutual agreement with the Committee"), and for what activities the employees will be paid. See Rule 1 (employees must perform necessary service or duties for eight hours each day). We agree with the district court that in the light of

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2 None of the cases cited by Lodge 306 that place paramount importance on past practices involved disputes covered by the written terms of a bargaining agreement. See Detroit and Toledo Shore Line R.R. Co. v. United Transp. Union, 396 U.S. 142, 153-54 (1969); Chicago and Northwestern, 827 F.2d at 334; Burlington Northern, 802 F.2d at 1022; Flight Attendants, 655 F.2d at 159

these express provision, evidence of past practices is not controlling.

Alton & Southern's interpretation that it may change the starting time to 8:00 a.m. is at least arguably comprehended within Rule 2. Lodge 306 does not contest this point. Rule 2 also expressly provides that the time and length of the lunch period "shall be subject to mutual agreement with the Committee." Alton & Southern complied with this provision, twice attempting to negotiate a new agreement before exercising its right to effect a unilateral change during the resolution of the minor dispute. See Burlington Northern, 802 F.2d at 1021. Similarly, the terms of the agreement also arguably comprehend Alton & Southern's interpretation of the issue of payment for time

spent eating lunch. Rule 1 provides that employees will recieve eight hours of pay for eight hours of work and defines work in such a way as to exclude, at least arguably, eating lunch. In addition, Rule 7 can be read reasonably to imply that lunch is unpaid, because it requires Alton & Southern to pay employees on-half hour at straight time if they must work through lunch. By contrast, Rule 3 expressly provides for a paid lunch when two or three shifts are employed, a provision that is conspicuously absent from the rule governing a single shift. For these reasons, we find that Alton & Southern has met its "relatively light burden" of demonstrating that its interpretation is arbuably comprehended within the agreement and that therefore the dipute is

minor. See Burlington Northern, 802 F.2d at 1022. Furthermore, even considering past practices in conjunction with the agreement, we do not find Alton & Southern's interpretation so unreasonable as to be "'obviously unsubstantial.'" Flight Attendants, 655 F.2d at 159 (citation omitted).

We also agree with the district court that Lodge 306 failed to make the requisite showing under traditional equitable principles to justify the issuance of an injunction in a minor dispute, because any injury sustained by Lodge 306 would be compensable by money damages.

The judgment dismissing Lodge 306's complaint and denying as moot Alton &

Southern's motion to reopen the record is affirmed.

HEANY, Circuit Judge, dissenting.

I respectfully dissent. The United States Supreme Court made it clear in The Detriot & Toledo Shore Line R.R. Co. v. United Transp. Union, 396 U.S. 142 (1969), that a railroad must maintain the status quo with respect to "actual bvjective working conditions * * *, irrespective of whether these conditions are covered in an existing collective agreement." Id. at 143. The Court stated:

> It is quite apparent that under our interpretation of the status quo requirement, the argument advanced by the Shore Line has little merit. The Railroad contends that a party is bound to preserve the status quo in only those working conditions covered in the parties' existing collective agreement, but nothing in the status quo provisions of §§5, 6,

or 10 suggests this restriction. We have stressed that the status quo extends to those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement. Thus, the mere fact that the collective agreement before us does not expressly prohibit outlying assignments would not have barred the railroad from ordering the assignments that gave rise to the present dispute if, apart from the agreement, such assignmemts had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions. Here, however, the dispute over the railroad's establishment of the Trenton assignments arose at a time when actual working conditions did not include such assignments. It was therefore incumbent upon the railroad by virtue of §6 to refrain from making outlying assignments at Trenton or any other place in which there had previously been none, regardless of the fact that the railroad was not precluded from making these assignments under the Trenton or any other place in which there had previously been none, regardless of the fact that the railroad was not precluded from making these assignments under the existing agreement.

Id. at 153-54 (empahsis added and footnote omitted.

Here, the district court found, and the railroad does not dispute, that for thirty years the railroad's carmen worked from 7:00 a.m. to 3:00 p.m., with a twenty minute paid lunch break. In 1983, the railroad decided that it wanted to discontinue the paid lunch period. It negotiated for a short period concerning this subject with the union. When the union would not agree to the proposed change, the railroad unilaterally discontinued the paid lunch period without complying with the mediation provisions of the Railway Labor Act. Given these facts, Detroit & Toledo Shore Line R.R. requires us to reverse the district court.

The majority asserts that the past practice rule is applicable only where

the practice of the parties fills in for circumstances not covered by the agreement. This view is directly contrary to Supreme Court doctrine and should not be adopted by this Court. The only question in this circumstance should be the one posed by Judge Arnold, writing for the Court in Independent Federation of Flight Attendants v. Trans World Airlines, Inc., 655 F.2d 155 (8th Cir. 1981).

> Section 6 of the Act applies only where there is an intended change "in agreements affecting . . working conditions" of the employees. The term "working conditions" is to be broadly interpreted. * * * It includes those actual, objective working conditions out of which the dispute arose and which my not necessarily be covered in an existing collective bargaining agreement. * * * These conditions, however, must have achieved the level of established practices and customs. * * * We have held that "to establish a long-standing custom and practice, the conduct of the parties must encom-

> pass a continuity, interest, purpose and understanding which elevates a course of action to an implied contractual status.

Id. at 157 (emphasis added and citations omitted).

Judge Arnold went on to point out that in the case under consideration the practice had not been elevated to implied contractural status. Here, however, it cannot be argued that the practice was not clearly established. Indeed, the contrary seems to be conceded. The argument relied upon the the majority, rather, is that if the collective bargaining agreement can arguably be interpreted to permit the railroad to do what it wants to do, the established past practice rule of the Supreme Court in Detroit & Toledo Shore Line R.R. is not applicable. The majority's erroneous interpretation thus

effectively overrules Detroit & Toledo Shore Line R.R.

This Court followed Independent Federation of Flight Attendants in Missouri Pacific Joint Protective Bd. v. Missouri Pacific R.R., 730 F.2d 533 (8th Cir. 1984) (MoPac). There, Judge John R. Gibson, writing for the Court stated:

> In the instant case there is at least one factual issue that needs to be determined. Whether MoPac has engaged in similar operational changes in the past which would amount to "established past practices" is in dispute. While MoPac argues that it has been making similar operational changes for at least ten years, the Brotherhood denies that there are any established past practices justifying MoPac's actions, and contends that it was not aware of any similar prior operational changes. Whether MoPac has made similar operational changes capable of constituting "established past practices" could be significant, if not determinative, in the resolution of whether the dispute is major or minor.

Id. at 357 (citations omitted).

We again followed Independent Federation of Flight Attendants in Brotherhood of Maintanence of Way Employees, Lodge 16 v. Burlington Northern R.R. Co., 802 F.2d 1016 (8th Cir. 1986). There Judge Arnold, writing for the Court, stated:

> When longstanding practice ripens into an established and recognized custom between the parties, it ought to be protected against sudden and unilateral change as though it were a part of the collective-bargaining agreement itself. Such practices have been described as the "actual, objective, working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose." Detroit & Toledo Shore Line Railroad v. United Transportation Union, 396 U.S. 142, 153, 90 S.Ct. 294, 301, 24 L.Ed.2d 325 (1969).
>
> * * * *
>
> Applying these principles to the facts of the present case, we note that nothing in the collective bargaining agreement refers in any

> way to Rule G or to enforcement of investigative methods. Nevertheless, we agree with the District Court that the union has long shared in BN's concern over the abuse of alcohol and drugs by employees on the job. Accordingly, the parties have acquiesced in certain detection and investigation methods over the years, and these practices may fairly be considered to have become the status quo. That being so, the railroad may not depart from these established practices in such a substantial way as to abrogate the implied contractual term which they represent. But so long as the railroad keeps within the bounds of this understanding, the employees are not entitled to an injunction against minor changes in method which are reasonably within the agreement.

Id. at 1022

Here, the railroad is not making a minor change. it is abrogating a longstanding established practice of paying employees for their lunch period. It should be enjoined from doing so until such time as it complies with the

provisions of Section 6 of the Railway Labor Act.

If the majority's opinion is permitted to stand, we wile reduce the past practice rule established in Detroit & Toledo Shore Line R.R. to a meaningless phrase. We are not permitted to do this.

A true copy.

Attest: Clerk, U.S. Court of Appeals,
Eighth Circuit.

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 87-1151

Alton & Southern Lodge No. 306
Brotherhood Railway Carmen of the
United States and Canada,
Appellee,
v.
The Alton & Southern Railway Co.,
Appellant.

No. 87-1139

Alton & Southern Lodge No. 306
Brotherhood Railway Carmen
of the United States and Canada,
Appellant,
v.
The Alton & Southern Railway Co.,
Appellee.

Appeals form the United States District
Court for the Eastern District of
Missouri

This appeal from the United States District Court was submitted on the record of the district court, briefs of

the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

June 21, 1988.

A true copy.

ATTEST: Robert St. Vrain
Clerk, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

MANDATE ISSUED: SEPTEMBER 22, 1988

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ALTON AND SOUTHERN LODGE NO. 306,
BROTHERHOOD OF RAILWAY CARMEN OF THE
UNITED STATES AND CANADA,
Plaintiff,
v.
THE ALTON AND SOUTHERN RAILWAY COMPANY,
Defendant.

No. 84-1011 C (2)

JUDGMENT

In accordance with the Memorandum filed this day and incorporated herein by reference,

IT IS HREEBY ORDERED, ADJUDGED, and DECREED that defendant shall have judgment against plaintiff and that plaintiff's complaint is DISMISSED with prejudice. Plaintiff shall pay the costs of this action.

Dated this 14th day of January,

1987.

Edward L. Filippine
U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ALTON & SOUTHERN LODGE NO. 306,
BROTHERHOOD RAILWAY CARMEN OF THE
UNITED STATES AND CANADA,
Plaintiff,

v.

ALTON & SOUTHERN RAILWAY COMPANY,
Defendant.

MEMORANDUM

This matter is before the Court after trial for a decision on the merits. The Court adopts this entire memorandum as its findings of fact and conclusions of law pursuant to Red.R.Civ.P. 52. The matter arises from a labor dispute between the parties and is governed by the Railway Labor Act, 45 U.S.C. Secs. 151-188.

The parties have stipulated to the following facts which spell out the basic controversy.

Plaintiff Alton and Southern Lodge No. 306 Brotherhood Railway Carmen of the United States and Canada is a duly organized and existing labor organization composed of carmen employed by defendant The Alton & Southern Railway Company. Plaintiff is affiliated with the Brotherhood Railway Carmen of the United States and Canada. Defendant is a duly organized and existing corporation engaged primarily in the transportation of freight by rail.

Defendant and its carmen employees assigned to work on the repair track are governed by several collective bargaining agreements including the general working agreement. The general

working agreement is entitled "Agreement Between Alton and Southern Railroad and System Federation No. 154, Railway Employees Department, AFL-CIO." This agreement, governing rates of pay, rules and working conditions for defendant's carmen employees assigned to the repair track, has been amended from time to time.

For approximately thirty years prior to November 22, 1983, defendant's carmen employees assigned to the repair track worked from 7:00 a.m. to 3:00 p.m. with the exception of one carman-painter who worked from 8:00 a.m. to 4:00 p.m. All of those empoyees had a paid twenty minute lunch period.

Defendant wanted to change the hours and time and length of the lunch period of its carmen employees assigned to the

repair track and met with representatives of the carmen on two occasions. During both of these meetings, defendant informed the carmen's representatives of the desire to change the hours and length of lunch of carmen employees from 7:00 a.m. to 3:00 p.m. with a twenty minute paid lunch to 8:00 a.m. to 4:30 p.m. with a thirty minute unpaid lunch. The parties did not reach an agreement, and defendant changed the hours in accordance with their stated plans effective November 22, 1983.

As the Court has stated and the parites have stipulated, the matter is governed by the Railway Labor Act. The question facing the Court is one categorizing the parties' dispute to determine the appropriate non-judicial

procedure under the Act to utilize in resolving the dispute.

If the dispute is "minor," the problem is one within the exclusive jurisdiction of the National Railroad Adjustment Board under 45 U.S.C. Sec. 153 (i) and the Court can only grant injunctive relief under the ordinary equitable principles. If the dispute in major" "courts have broad powers to enjoin unilateral action by either side in order to preserve the status quo while statutory settlement procedures go forward." Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad Company, 802 F.2d 1016, 1021 (8th Cir. 1096) (Arnold, J., concurring).

Judge Arnold's concurring opinion, in which all of the members of hte court

joined, set out the standard for determining whether a dispute is "major" or "minor."

> [A] dispute is minor if the agreement is "reasonably susceptible" of the interpretations sought by both the employer and the employees. Independent Federation of Flight Attendants v. Trans World Airlines, 655 F.2d 155, 158 (8th Cir. 1981). Other courts have said that a dispute is minor if the employer's actions can be arguably justified under the terms of the existing agreement, see, e.g., REA Express, Inc. v. Brotherhood of Railway, Airline, and Steamship Clerks, 459 F.2d 226, 231 (5th Cir.), cert. denied, 409 U.S. 892 (1972), or that the dispute is minor unless the employer's argument that is actions are within the contract is "obviously insubstantial," see Airlines Stewards & Stewardesses Association v. Caribbean Atlantic Airlines, 412 F.2d 289, 291 (1st Cir. 1969). These locutions are essentially the same in their result. They illustrate the relatively light burden which the railroad must bear in showing that its actions are at most minor changes and thus within the status quo.

Id.at 1022.

In determining what the agreement between the parties is, the Court must look beyond the express words of the contract. It is impossible for the written contract to describe every possible aspect of working conditions, and the parties are to develop customs and practices which are understood to be the norm. "When longstanding practice ripens into an established and recognized custom between the parties, it ought to be protected against sudden and unilateral change as though it were a part of the collective bargaining agreement itself." Id. The past practices of the parties are clearly relevant and to the extent defendant's motion in limine seeks to exclude evidence of past practices it is denied.

Defendant argues that the dispute here is minor, that is, arguably justified under the existing agreement and, therefore, within the exclusive jurisdiction of the National Railroad Adjustment Board. Defendant bases its decision on Rules 1, 2, 3 and 7 of the collective bargaining agreement which provides in relevant part,

> RULE 1. Eight (8) hours shall constitute a day's work, and six (6) days per week for the regular forces. Should a depression in business make it necessary to temporarily reduce expenses, the hours per week may be reduced to forty (40) hours, and if necessary, to continue for four weeks, after which time the regular six (6) days per week must be worked, and if still necessary, a reduction in force must be made in accordance with Rule 15.
>
> RULE 2. When one shift is employed, the starting time shall not be earlier than 7:00 a.m., nor later than 8:00 a.m. The time and length of the lunch period shall be subject to mutual agreement with the Committee.

RULE 3. When more than one shift is employed, the starting time of the first shift shall be governed by Rule 2. The starting time of the second, or the second and third shifts shall be arranged for the best interest of the work to be performed, but in no case inconsistent with the employee's welfare. Each shift shall consist of eight (8) consecutive hours including an allowance of twenty (20) minutes for lunch within the limits of fourth and fifth hours. When service requirements will not permit the taking of the lunch period within the fourth and fifth hours as per this rule, a penalty time of twenty (20) minutes at pro rata rate will be allowed and the employee will be allowed to procure lunch without loss of time as soon thereafter as possible.

....

RULE 7. Employees assigned under the provisions of Rule 2 required to work during the lunch period will be paid for one-half hour at straight time and be allowed necessary time to procure lunch without loss of time.

Rule 2 specifically sets out the starting time for workers on one shift. The defendant's change of starting time

is clearly within these express limitations, and defendant's position is, therefore, arguable within the definition of minor disputes.

Rule 2 further states that the time and length of lunch is subject to mutual agreement with the Committee. Defendant interprets this provision to mean that the parties must meet and negotiate these terms. The parties did meet but were unable to come to an agreement. Again, the Court finds that defendant's interpretation is arguable and this brings it within the definition of "minor" disputes.

The question of whether nonpayment of time for lunch is arguably within the terms of the collective bargaining agreement is more difficult. Rule 1 states that eight hours equals a day's

work, and, the company reasons that lunch is not work so that no compensation is required. Further, Rule 3 specifically provides that workers on multiple shifts are entitled to paid lunch, while no such provision exists within the rules for single shift employees. Finally Rule 7 provides for special compensation where single shift employees are required to work through lunch. The rule gives the inference that single shift workers are not ordinarily paid for lunch. The Court finds that defendant's position with regard to the payment of lunch is arguable based on the collective bargaining agreement.

Plaintiff correctly argues that the Court's determination cannot be made without considering the practices of the parties. The evidence clearly shows

that the parties' past practice was that one shift employees were paid for lunch. This was the practice of approximately 30 years with the exception of five to seven years when the carmen were on three shifts.

This case, however, does not present a situation where the practice of the parties fills in for circumstances not covered by the agreement. Defendant has made an arguable case that nonpaid lunch was bargained for and given in the exchanged of promises set out in the written collective bargaining contract. In such a case, the Court believes the matter is within the definition of "minor" dispute. See Brotherhood of Railway Carmen of the United States and Canada, AFL-CIO-CLC v. Norfolk and Western Railway Company, 745 F.2d 370,

377-78 (6th Cir. 1984) (past practices did not dictate decision in light of railroad's arguable contentions based on contract language).

Having determined that the matter is a "minor" dispute under the Railway Labor Act, the Court feels that plaintiff has failed to make the requisite showing under traditional equitable principles to justify injunctive relief. Specifically, the Court finds that any damage to plaintiff is compensable by money damages. Defendant's motion in limine and to strike will be denied as moot to the extent it relates to actual and punitive damages. Plaintiff's objections to defendant's exhibits A and S are overruled. Plaintiff's objections to defendant's exhibits B, C, O, P, Q, W, and X are overruled as moot.

Finally, defendant's motion to reopen the record to include the decision of the National Railway Adjustment Board in defendant's favor will be denied as moot.

Dated this 14th day of Januuary, 1987.

Edward J. Filippine, United States District Judge.

APPENDIX E

United States Court Of Appeals
FOR THE EIGHTH CIRCUIT

No. 87-1139EM

Alton & Southern Lodge No. 306, etc.,
Appellant,

vs.

The Alton & Southern Railway Co.,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is hereby denied.

Judges Gerald W. Heaney, Theodore McMillian and Richard S. Arnold would have granted the petitions.

Petition for rehearing by the panel is also denied.

September 14, 1988

Order entered at the direction of the Court:
Robert St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX F

AGREEMENT

between

ALTON AND SOUTHERN RAILROAD

and

STATE FEDERATION NO. 154,
RAILWAY EMPLOYES' DEPARTMENT,
A.F.L. - C.I.O.

Establishing

Rules, Rates of Pay, and Working Conditions
for
Machinists, Boilermakers, Blacksmiths, Sheet Metal Workers, Carmen, and their respective Apprentices and Helpers, employed in various departments.

RULE 2. When one shift is employed, the starting time shall not be earlier than 7:00 a.m., nor later than 8:00 a.m. The time and length of the lunch period shall be subject to mutual agreement with the Committee.

APPENDIX G

Sec. 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided --

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of facts and all supporting data bearing upon the disputes.

(2)

Supreme Court, U.S.
FILED
MAR 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALTON & SOUTHERN LODGE NO. 306,
BROTHERHOOD OF RAILWAY CARMEN OF THE
UNITED STATES AND CANADA,
Petitioner,

VS.

THE ALTON & SOUTHERN RAILWAY COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THOMAS R. JAYNE*
R. MICHAEL LOWENBAUM
THOMPSON & MITCHELL
One Mercantile Center
Suite 3400
St. Louis, Missouri 63101
(314) 231-7676
Attorneys for Respondent

*Counsel of Record

St. Louis Law Printing Co., Inc., 13307 Manchester Road 63131 314-231-4477

QUESTION PRESENTED

Whether a court must look beyond the terms of a collective bargaining agreement to evidence of past practice for purposes of determining whether a dispute is minor or major under the Railway Labor Act when the parties' interpretations arguably are comprehended by the express language of the agreement.

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No. 88-1116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALTON & SOUTHERN LODGE NO. 306,
BROTHERHOOD OF RAILWAY CARMEN OF THE
UNITED STATES AND CANADA,
Petitioner,

VS.

THE ALTON & SOUTHERN RAILWAY COMPANY,[1]
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL STATEMENT OF CASE

A. APPLICABLE COLLECTIVE BARGAINING PROVISIONS AND PROCEEDINGS IN THE COURTS BELOW

Petitioner's statement of the case and Appendix F (A-44) omits relevant facts crucial to the holding of the United States Court of Appeals for the Eighth Circuit. Respondent thus supplements Petitioner's statement.

---

[1] In accordance with Supreme Court Rule 28, Respondent's parent subsidiary, and affiliated companies include: Missouri Pacific Railroad Company and St. Louis Southwestern Railroad Company, Southern Pacific Railroad Company, and Denver, Rio Grande and Western Railroad Company.

Petitioner Alton & Southern Lodge No. 306 is a labor organization representing carmen employed by Respondent, The Alton & Southern Railway Company. Petitioner and Respondent are parties to a collective bargaining agreement covering rates of pay, work rules and working conditions. The agreement provides in relevant part as follows:

> **Rule 1:** Eight (8) hours shall constitute a day's work, and five (5) days per week for the regular forces.
>
> . . .
>
> NOTE: The expressions "positions" and "work" used in this Rule refer to service, duties or operations, necessary to be performed. . .
>
> **Rule 2:** When one shift is employed, the starting time shall not be earlier than 7:00 a.m., nor later than 8:00 a.m. The time and length of the lunch period shall be subject to mutual agreement with the Committee.
>
> **Rule 3:** When more than one shift is employed, the starting time of the first shift shall be governed by Rule 2. The starting time of the second, or the second and third shifts shall be arranged for the best interest of the work to be performed, but in no case inconsistent with the employee's welfare. Each shift shall consist of eight (8) consecutive hours, including an allowance of twenty (20) minutes for lunch within the limits of the fourth and fifth hours. When service requirements will not permit the taking of the lunch period within the fourth and fifth hours as per this rule, a penalty time of twenty (20) minutes a pro rata rate will be allowed and the employee will be allowed to procure lunch without loss of time as soon thereafter as possible.
>
> **Rule 7:** Employees assigned under the provisions of Rule 2 required to work during the lunch period will be paid for one-half hour straight time and be allowed the necessary time to procure lunch without loss of time.

Appendix A-1.

Article V of the Agreement provides a grievance procedure for resolving disputes concerning interpretation or application of the Agreement. If the parties are unable to settle the matter through the grievance process, either party may appeal to the National Railroad Adjustment Board ("NRAB") for a final and binding decision on the merits pursuant to Section 3 of the Railway Labor Act ("RLA"), (Appendix A-1, 45 U.S.C. § 153 *et. seq.*).

After Petitioner filed this suit in state court, it *did* submit the case to the NRAB for resolution as a minor dispute under RLA procedures. The state court case was removed to the United States District Court for the Eastern District of Missouri and tried without a jury. On August 27, 1986, following trial but prior to the District Court's decision, the NRAB ruled on the merits of the dispute. The NRAB held that Rule 2 of the contract clearly provides for a change in hours and "failure to achieve mutual agreement over the timing and length of the lunch period cannot be converted into a power of veto," denying Petitioner's claim. *Brotherhood Railway Carmen v. Alton and Southern Railway Co.*, Award 10964 at 3 (NRAB August 27, 1986). On September 10, 1986, Respondent moved the District Court to reopen the record to include the NRAB decision. The District Court held that this controversy was a minor dispute, however, and denied Respondent's motion as moot. Respondent cross-appealed from the denial of this motion. The Eighth Circuit Court of Appeals affirmed the District Court's characterization of the dispute as minor and therefore also found Respondent's motion moot.

B. The United States Court Of Appeals For The Eighth Circuit's Holding

This dispute centers around Respondent's changing the starting time, time and duration of lunch, and the activities for which it pays carmen. The parties have stipulated to the rele-

vant facts underlying this dispute which are summarized in the decision of the Eighth Circuit Court of Appeals. *See Alton & Southern Lodge No. 306, Brotherhood Railway Carmen of the United States and Canada v. The Alton & Southern Railway Co.*, 849 F.2d 1111, 1112-13 (8th Cir. 1988) ("Alton & Southern").

For approximately thirty (30) years carmen reported to work at 7:00 a.m. and quit work at 3:00 p.m., with a twenty (20) minute paid lunch period included. Respondent notified Petitioner of its desire to change the working hours for carmen to 8:00 a.m. - 4:30 p.m., with an unpaid lunch period. The parties engaged in negotiations over this issue, but were unable to reach agreement. On November 22, 1987, Respondent implemented its proposed changes. *Id.* at 1113.

Petitioner contended that this change created a "major dispute," thus entitling it to injunctive relief. The Eighth Circuit Court of Appeals affirmed the District Court's holding that the dispute between the parties was "minor" because the changes which Respondent implemented were "arguably comprehended" by the express terms of the collective bargaining agreement and because the agreement was "reasonably susceptible to" Respondent's interpretation of its terms. *Id.* at 1114-15. The District Court held that evidence of past practice presented by Petitioner was not "dispositive" because it could not be used to contradict the explicit language of the collective bargaining agreement and convert the dispute into a major dispute. *Id.* at 1114. The Court went on to explain why it believed the changes implemented by Respondent arguably were comprehended by the express terms of the collective bargaining agreement:

> The terms of the agreement for a single shift cover starting time, *see* Rule 2 ("starting time shall not be earlier than 7:00 a.m., nor later than 8:00 a.m."), the time and duration of lunch, *see Id.* ("[t]he time and length of the lunch period shall be subject to mutual

agreement with the Committee''), and for what activities the employees will be paid. *See* Rule 1 (employees must perform necessary service or duties for eight hours each day). We agree with the district court that in light of these express provisions, evidence of past practices is not controlling.

Alton and Southern's interpretation that it may change the starting time to 8:00 a.m. is at least arguably comprehended within Rule 2. Lodge 306 does not contest this point. Rule 2 also expressly provides that the time and length of the lunch period ''shall be subject to mutual agreement with the Committee.'' Alton and Southern complied with this provision, twice attempting to negotiate a new agreement before exercising its right to effect a unilateral change during the resolution of the minor dispute. *See Burlington Northern,* 802 F.2d at 1021. Similarly, the terms of the agreement also arguably comprehend Alton and Southern's interpretation of the issue of payment for time spent eating lunch. Rule 1 provides that employees will receive eight hours of pay for eight hours of work and defines work in such a way as to exclude, at least arguably, eating lunch. In addition, Rule 7 can be read reasonably to imply that lunch is unpaid, because it requires Alton and Southern to pay employees one-half hour of straight time if they must work through lunch. By contrast, Rule 3 expressly provides for a paid lunch when two or three shifts are employed, a provision that is conspicuously absent from the rule governing a single shift. For these reasons, we find that Alton and Southern has met its ''relatively light burden'' of demonstrating that its interpretation is arguably comprehended within the agreement and that therefore the dispute is minor. *See Burlington Northern,* 802

> F.2d at 1022. Furthermore, even considering past practices in conjunction with the agreement, we do not find Alton and Southern's interpretation so unreasonable as to be "obviously unsubstantial." *Flight Attendants,* 655 F.2d at 159 (citation omitted).

Alton & Southern, 849 F.2d at 1114-15.

ARGUMENT AGAINST ALLOWANCE OF WRIT

Respondent submits this case presents no issue worthy of consideration by this Court. Petitioner would have this Court undermine the exclusive jurisdiction of the National Railroad Adjustment Board ("NRAB") and arbitration procedures of the RLA by permitting labor organizations to obtain status quo injunctions where the dispute involves conflicting evidence of past practice and interpretations arguably comprehended within the express language of a collective bargaining agreement. Petitioner improperly attempts to bring this case within the past practice rule enunciated by this Court in *Detroit & Toledo Shore Line Railroad v. United Transportation Union,* 396 U.S. 142, 90 S. Ct. 294 (1969) ("Shore Line"). *Shore Line* and other decisions cited by Petitioner clearly are distinguishable because they did not involve situations in which specific contractual language conflicted with evidence of the parties' past practice. The instant case presents a classic minor dispute between a carrier and union over the interpretation and application of language in an existing collective bargaining agreement relating to rates of pay, work rules and working conditions. While evidence of past practice is relevant in deciding the ultimate issue of the lawfulness of Respondent's actions, this is a task for the NRAB, not the courts.

The United States Court Of Appeals For The Eighth Circuit Applied The Proper Legal Standard

Under the RLA, disputes fall into two "sharply distinguished" categories. *See Elgin, Joliet & Eastern Railway Co. v. Burley,* 325 U.S. 711, 722, 65 S. Ct. 1282, 1290 (1945), *aff'd on rehearing,* 327 U.S. 661, 66 S. Ct. 721 (1946) ("Elgin"). The first category, known as "minor" disputes, involve disputes over existing rights and encompass controversies rooted in the meaning or proper application of collective bargaining agreement provisions relating to rates of pay, work rules or working conditions. *Id.,* 325 U.S. at 723, 65 S. Ct. at 1289-90. *See* 45

U.S.C. §153, First (i). If attempts to settle a minor dispute are unsuccessful, the RLA compels the parties to submit the matter to the NRAB for final and binding arbitration. 45 U.S.C. §153, First (i), (m). The NRAB's jurisdiction to review disputes is exclusive and the RLA does not permit a court to determine, in the first instance, the merits of a minor dispute. *See Gainey v. Brotherhood of Railway and Steamship Clerks,* 275 F.2d 342 (3d Cir.), *cert. denied.,* 363 U.S. 811, 80 S. Ct. 1248 (1960). Further, if the surrounding circumstances are ambiguous, the courts favor construing disputes as minor. *See Brotherhood of Locomotive Engineers v. Atchison, Topeka and Santa Fe Railway Co.,* 768 F.2d 914, 920 (7th Cir. 1985).

The second category of disputes, known as "major" disputes, relate to collective bargaining for a new or amended contract, or unilateral alteration of a contract term by a party to obtain future rights. *Elgin,* 327 U.S. at 723, 65 S. Ct. at 1290. "Therefore the issue is not whether an existing agreement controls the controversy." *Id. See* 45 U.S.C. §156. Major disputes cannot be resolved by reference to or in a manner contemplated by the existing collective bargaining agreement, and injunctive relief may be granted to preserve the status quo if a party invokes the mediation and conciliation service provided by the National Mediation Board ("NMB"). *Elgin,* 327 U.S. at 723, 65 S. Ct. at 1290. The parties are then free to resort to unilateral action should mediation prove unsuccessful. 45 U.S.C. §156.

Petitioner's argument, simply stated, is that the Eighth Circuit Court of Appeals should have determined "as a matter of law" that the evidence of past practice is so compelling in this case that it rises to the level of an implied term of the parties' contract and supplants any contrary provision previously bargained for and expressly included therein. Thus, Petitioner's rationale compels the conclusion that the changes implemented by Respondent constitute a major dispute due to unilateral alteration of a contract, entitling Petitioner to injunctive relief to preserve the status quo. Petitioner's argument goes to the

merits of this dispute and ignores the applicable tests used by the federal courts to categorize disputes arising under the RLA. More importantly, Petitioner's position totally disregards the purpose and scope of the nonjudicial mechanisms created by Congress for resolving such disputes.

While attempting to convince the District Court that this dispute should be categorized as a major dispute, Petitioner simultaneously arbitrated the merits of its claim before the NRAB. Presumably if Petitioner had convinced the NRAB that its interpretation of the collective bargaining agreement was appropriate, it would have abandoned its position that this is a major dispute. Unhappy with the interpretation given by the NRAB, however, Petitioner now asks this Court to declare, as a matter of law, that Respondent's action was a unilateral alteration of, or addition to, the collective bargaining agreement, and it is entitled to a status quo injunction and mediation.

Petitioner's actions in pursuing this matter through the judicial system fly in the face of Congress' clear meandate that the NRAB's decision is final and binding on both parties. In enacting the RLA, Congress expressly provided this principle of finality to keep minor disputes out of the courts. *Union Pacific Railroad Co. v. Sheehan,* 439 U.S. 89, 94, 99 S.Ct. 399, 402 (1978).

The Eighth Circuit applied well-settled legal standards for determining whether a dispute is minor or major under the RLA. The Court of Appeals panel affirmed the District Court's finding that the parties' past practices were 'clearly relevant,' to ascertaining the content of the collective bargaining agreement, but "did not supply a term or condition of the working relationship between the parties that was *not included* within the written agreement." *Alton & Southern,* 849 F.2d at 1114 (emphasis added) (citing *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad Co.,* 802 F.2d 1016, 1022 (8th Cir. 1986) ("Burlington Northern"). Because express

contractual language governing the parties' dispute is contained in the collective bargaining agreement, the panel correctly held past practice is not "dispositive" for purposes of determining whether a dispute is minor or major. *Id.* The panel went on to find Respondent met its "relatively light burden" of demonstrating that its interpretation is 'arguably comprehended' within the agreement and is therefore a minor dispute. *Id.* at 1115.

Contrary to Petitioner's assertion, the characterization of the terms of the agreement is a finding of fact governed by the clearly erroneous standard of appellate review. *Id.* at 1114. *See Anderson v. City of Bessemer City,* 470 U.S. 564, 573, 105 S. Ct. 1504, 1511 (1985); *Brotherhood of Maintenance of Way Employees v. Chicago and North Western Transportation Co.,* 827 F.2d 330, 334 (8th Cir. 1987), *cert. denied,* 108 S. Ct. 1291 (1988). After ascertaining the content of the collective bargaining agreement, the panel properly applied the appropriate legal standard to determine whether the dispute was a minor or major dispute under the RLA.

The Holding of the United States Court Of Appeals For The Eighth Circuit Is Consistent With Applicable Decisions of the Supreme Court and the Other Circuits

The holding of the Eighth Circuit Court of Appeals is consistent with the decisions of this Court and other federal courts of appeals confronted with the same issue. In determining whether a dispute is minor or major, the courts need not look to past practice when a collective bargaining agreement contains language covering the dispute. When the language of the parties' collective bargaining agreement makes a railroad's position arguably correct, the court's inquiry is at an end. The Sixth Circuit succinctly stated the scope of the court's limited review as follows:

> Past practice cannot make a construction which has already been determined to be arguable frivolous

> or a substantial argument insubstantial. Evidence such as this is to be used in determining the ultimate meaning of the Agreement (citation omitted) ... but that is a task for arbitrators, not for courts. When making only a provisional determination that the railroad's action is arguably sanctioned by the agreements, evidence of past practice is not dispositive in the face of contrary indications from the agreement's language.

Brotherhood Railway Carmen of the United States and Canada v. Norfolk and Western Railway Co., 745 F.2d 370, 377 (6th Cir. 1984) ("Norfolk and Western").

In the present case, the express terms of the contract arguably comprehend the changes which Respondent implemented and is not silent regarding those changes. The Eighth Circuit panel applied the proper legal standard in a manner consistent with the decisions of other federal courts. *See Railway Labor Executives Ass'n v. Norfolk and Western Railway Co.*, 833 F.2d 700, 704 (7th Cir. 1987) (where parties disagree as to whether past practice or existing contract permits challenged action, the dispute is minor unless carrier's claimed contractual justification is "frivolous" or "obviously insubstantial"); *Norfolk and Western*, 745 F.2d at 377; *Airline Pilots Ass'n v. Trans World Airlines, Inc.*, 713 F.2d 940, 948 (2d Cir. 1983), *aff'd in part, rev.'d in part sub. nom, Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (court held minor dispute despite evidence of past practice where there is "clearly governing" language in the collective bargaining agreement); *Switchmen's Union v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968) (court must determine if position of one of parties is "arguably predicated" on the terms of the agreement); *United Transportation Union v. Norfolk and Western Ry. Co.*, 605 F. Supp. 169, 171 n.1. (W.D. Va. 1985) (consideration of past practice only necessary when an "arguably applicable" provision is absent from written agreement).

Petitioner's argument is based primarily upon the misapplication of this Court's holding in *Shore Line*. *Shore Line* "dealt only with the scope of the status quo requirement in a dispute that all parties assumed to be major." *Norfolk & Western,* 745 F.2d at 376. Moreover, the Eighth Circuit correctly noted that *Shore Line* and the past practice cases cited by Petitioner did not involve "disputes covered by the written terms of a bargaining agreement." 849 F.2d at 1114, n.2 (distinguishing: *Shore Line; Brotherhood of Maintenance of Way Employees v. Chicago and North Western Transp. Co.,* 827 F.2d 330, 334 (8th Cir. 1987); *Burlington Northern,* 802 F.2d at 1022; *Independent Federation of Flight Attendants v. Trans World Airlines,* 655 F.2d 155, 159 (8th Cir. 1981)).

Petitioner's argument that the Eighth Circuit's decision effectively overrules *Shore Line* and other precedent also misstates the Eighth Circuit's holding. That court merely held that when the express terms of the collective bargaining agreement are "reasonably susceptible" to the parties' interpretation, there is no need to consider the parties' past practices for purposes of classifying a dispute as minor or major. In fact, the court specifically looked to the parties' practice and the language contained in the collective bargaining agreement to determine what the terms of the agreement were and whether the dispute involved unilateral changes in the status quo or a dispute over the interpretation or application of the agreement. If the collective bargaining agreement is silent regarding the changes, evidence of the parties' past practice could then be dispositive. Moreover, consideration of the parties' past practice would not automatically convert a dispute into a major dispute. Such a finding would depend upon whether the changes in question are arguably comprehended by the parties' past practices. *Burlington Northern,* 802 F.2d at 1016, 1022.

Petitioner also presents no compelling policy reasons for this Court to grant its Petition for Writ of Certiorari. The specter of unilateral action by carriers running roughshod over labor

organizations and employees and massive labor unrest and strikes is completely unfounded in law or fact. Carriers are restrained by the express terms and interpretations "arguably comprehended" within the scope of a collective bargaining agreement and the RLA. The RLA specifically permits an aggrieved party to seek redress through the mandatory arbitration provisions of the NRAB. Contrary to Petitioner's assertions, the Eighth Circuit's standard is consistent with the statutory scheme of the RLA and adequately safeguards the rights of parties in categorizing minor and major disputes without becoming needlessly entangled in the merits of litigation.

Respondent submits that the standard applied by the Eighth Circuit Court of Appeals in determining whether a dispute is minor or major under the RLA properly safeguards the exclusive jurisdiction of the NRAB, prevents the federal courts from becoming entangled in the merits of disputes which arguably are within the NRAB's jurisdiction, and eliminates the possibility of conflicting decisions between the NRAB and the courts. The present case clearly demonstrates this principle since Petitioner pursued its grievance through the grievance process in the contract and then to the NRAB, where Respondent prevailed on the merits of Petitioner's claim.

CONCLUSION

This case involves a straightforward dispute between a carrier and labor organization over existing rights expressly covered by a collectve bargaining agreement governing pay rates, rules and working conditions. There is no conflict between the Eighth Circuit Court of Appeals' decision and existing Supreme Court precedent or decisions of the other United States Circuit Courts of Appeals. Therefore, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THOMPSON & MITCHELL

By: Thomas R. Jayne
R. Michael Lowenbaum
One Mercantile Center
Suite 3400
St. Louis, Missouri 63101
(314) 231-7676

Attorneys for Respondent
The Alton and Southern Railway Company

APPENDIX

APPENDIX A

AGREEMENT

between

ALTON AND SOUTHERN RAILROAD

and

SYSTEM FEDERATION NO. 154,
RAILWAY EMPLOYEES' DEPARTMENT,
A.F.L. — C.I.O.

Establishing

Rules, Rates of Pay, and Working Conditions
for
Machinists, Boilermakers, Blacksmiths, Sheet Metal
Workers, Carmen, and their respective
Apprentices and Helpers,
employed in various
departments.

RULE 1. Eight (8) hours shall constitute a day's work, and five (5) days per week for the regular forces.

. . .

RULE 2. When one shift is employed, the starting time shall not be earlier than 7:00 a.m., nor later than 8:00 a.m. The time and length of the lunch period shall be subject to mutual agreement with the Committee.

RULE 3. When more than one shift is employed, the starting time of the first shift shall be governed by Rule 2. The starting time of the second, or the second and third shifts shall be arranged for the best interest of the work to be performed, but in no case inconsistent with the employee's welfare. Each shift

shall consist of eight (8) consecutive hours including an allowance of twenty (20) minutes for lunch within the limits of the fourth and fifth hours. When service requirements will not permit the taking of the lunch period within the fourth and fifth hours as per this rule, a penalty time of twenty (20) minutes at pro rata will be allowed and the employee will be allowed to procure lunch without loss of time as soon thereafter as possible.

RULE 7. Employees assigned under the provisions of Rule 2 required to work during the lunch period will be paid for one-half hour at straight time and be allowed necessary time to procure lunch without loss of time.

NOTE: The expressions "positions" and "work" used in this Rule refer to service, duties, or operations necessary to be performed the specified number of days per week, and not to the work week of individual employees.

AGREEMENT AND MEMORANDUM DATED AUGUST 21, 1954 AND LETTER OF UNDERSTANDING DATED AUGUST 21, 1954 BETWEEN RAILROADS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES AND THE EMPLOYEES OF SUCH RAILROADS REPRESENTED BY THE EMPLOYEES' NATIONAL CONFERENCE COMMITTEE, FIFTEEN COOPERATING RAILWAY LABOR ORGANIZATIONS.

(Note: These documents exclude employees represented by the Hotel and Restaurant Employees and Bartenders International Union.)

and

AGREEMENT AND MEMORANDUM DATED AUGUST 21, 1954 BETWEEN RAILROADS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES AND THE EMPLOYEES OF SUCH RAILROADS REPRESENTED BY THE HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION.

ARTICLE V — CARRIERS' PROPOSAL NO. 7

Establish a rule or amend existing rules as to provide time limits for presenting and progressing claims or grievances

This proposal is disposed of by adoption of the following:

The following rule shall become effective January 1, 1955:

1. All claims or grievances arising on or after January 1, 1955 shall be handled as follows:

(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the carrier as to other similar claims or grievances.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the re-

jection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.

(c) The requirements outlined in paragraphs (a) and (b), pertaining to appeal by the employee and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employee or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 9 months' period herein referred to.